

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE HERNANDEZ
Claimant

VS.

MONFORT, INC.
Respondent
Self-Insured

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Docket No. 225,823

ORDER

Respondent requested review of the preliminary hearing order entered October 28, 1997, by Administrative Law Judge Kenneth S. Johnson.

ISSUES

The Administrative Law Judge awarded claimant temporary total disability compensation and medical benefits finding claimant had suffered a work-related injury from a series of accidents from October 11, 1996, through August 8, 1997. The Administrative Law Judge further found respondent had notice of the accident and that written claim was timely served upon respondent.

On appeal, respondent lists only notice as an issue in its Application For Review of Preliminary Award and in its brief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for preliminary hearing purposes the Appeals Board finds as follows:

The Administrative Law Judge found that claimant's supervisor was aware on October 15, 1996, that claimant had been given medical restrictions on what he could do at work and that claimant's back was hurting. From this, the Administrative Law Judge concluded that respondent had notice of the injury. Respondent disputes this finding because claimant said he thought it was his kidneys causing his back pain and that he did not have any recollection of any specific accident at work. Furthermore, claimant did not report suffering a new work-related injury to his low back until August 1997. It is also significant that claimant had previously suffered from low back problems that were not reported as work-related. Under these circumstances, knowledge by his supervisor that claimant was having back

problems in October and November of 1996, would not constitute actual knowledge by respondent of a new accidental injury.

Nevertheless, respondent provided claimant with medical treatment through Dr. Myron J. Zeller who released claimant back to work on November 7, 1996, with restrictions. Claimant's symptoms had not fully resolved and he was placed on light duty. Approximately July 1997, however, claimant was transferred to a more strenuous job trimming and pulling necks. This required repetitive bending and pulling, which aggravated his back pain. He also began having pain in his buttocks which he had not experienced before. Claimant reported this to respondent and was returned to Dr. Zeller who referred him to an orthopedic surgeon, Dr. John H. Gilbert.

Claimant has alleged a series of accidents through August 8, 1997. The record does establish an aggravation or worsening of claimant's back condition until August 8, 1997, when claimant was given a diagnosis and restrictions by Dr. Gilbert. Claimant reported a work-related accident within 10 days of August 8, 1997. Claimant did not specifically report a new accident earlier because claimant did not realize he had sustained a new, separate, and distinct injury or series of injuries until Dr. Gilbert informed claimant on August 8, 1997, after a MRI, that he had probably suffered an aggravation of his prior back injury. Until then, claimant did not know what was causing his increased pain. He believed it was probably either a continuation of his earlier back problems or possibly a kidney infection. Respondent contends claimant was never aware he had suffered a specific accident at work and thus never reported an accident within 10 days. See K.S.A. 44-520.

The Appeals Board finds that it was Dr. Gilbert, on August 8, 1997, who first suggested to claimant that he had suffered a new injury. Until that time, claimant reasonably believed that his symptoms were the ongoing result of his prior back problems. When Dr. Gilbert diagnosed a herniated disc, he also suggested that an aggravation had occurred. Based upon the evidence currently in the record, the Appeals Board finds an aggravation of claimant's pre-existing condition by a series of accidents ending August 8, 1997.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing order entered by Administrative Law Judge Kenneth S. Johnson, which is contained in the transcript dated October 28, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Terry J. Malone, Dodge City, KS
Office of the Administrative Law Judge, Garden City, KS
Philip S. Harness, Director